In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-954

STANDARD OIL COMPANY OF CALIFORNIA;
CHEVRON ASPHALT COMPANY; SHELL OIL COMPANY;
UNION OIL COMPANY; ARIZONA REFINING CO.;
EDGINGTON OIL COMPANY; SAHUARO OIL COMPANY;
DOUGLAS OIL CO. OF CALIFORNIA;
ATLANTIC RICHFIELD COMPANY; RICHFIELD OIL CORPORATION;
GULF OIL CORP.; WILSHIRE OIL CO. OF CALIFORNIA;
INDUSTRIAL ASPHALT, INC.; and
AMERICAN PETROFINA, INCORPORATED,

Petitioners,

vs.

STATES OF ALASKA, ARIZONA, CALIFORNIA, OREGON,
WASHINGTON, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on October 3, 1973.

OPINIONS BELOW

The opinion of the court of appeals, as amended (not yet reported) is printed in Appendix A, page 2. The opinion and order of the district court (350 F.Supp. 1369) is printed in Appendix B, page 18.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed and entered on October 3, 1973 (Appx. A, p. 1). This Court has jurisdiction under section 1254(1) of Title 28, United States Code.

QUESTION PRESENTED

These are suits by respondents to recover from petitioners treble damages under section 4 of the Clayton Act for alleged violations of the Sherman Act. Petitioners are manufacturers of asphalt who sell asphalt to respondents for use on highways, and who also sell asphalt to general contractors who build highways, or to subcontractors of such general contractors, or to hot plant operators who sell to subcontractors or general contractors. Respondents are states and other public bodies who purchase asphalt for use on highways and who also purchase from contractors, under competitive bidding, completed highways in which asphalt is an ingredient. In these actions respondents claim the right to recover treble the amount of the alleged conspiratorial overcharges, not only with respect to the asphalt purchased and used by respondents, but also with respect to asphalt purchased by general contractors and subcontractors and used by them in the construction of highways. In others of these actions, some of the general contractors who built the highways claim treble the same overcharge.

The question presented is whether respondents, who admittedly have causes of action for the alleged overcharges on asphalt purchased by them, also have causes of action under section 4 of the Clayton Act for the alleged overcharges on asphalt purchased by the general contractors or by their subcontractors and used by them in the construction of the highways, or whether such causes of action are in the contractors. The corollary question is whether the court below, in holding that respondents may recover treble the amount of the alleged overcharges paid by the contractors, failed to follow the decision of this Court in *Hanover Shoe v. United Shoe Mach.* (1968) 392 U.S. 481.

STATUTE INVOLVED

The statute involved is section 4 of the Clayton Act (15 U.S.C. 15), which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

Preliminarily, and to place the facts in perspective, we point out that in 1968 this Court—resolving a conflict of decisions in the lower Federal courts—held in *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 486 that, in the absence of a pre-existing cost-plus contract or its equivalent, the original purchaser of a price-fixed product is the person injured within the meaning of section 4 of the Clayton Act and is the person, in any chain of distribution, entitled to recover treble the full amount of the overcharge without regard to whether he included any or all of that overcharge in the price

charged to his customers.[1] This decision was based not only upon the fact that the original purchaser is the one injured in the full amount of the overcharge but also upon the holding that it would be a task of "nearly insuperable difficulty" to prove whether the original purchaser had passed on the illegal overcharge (see pp. 11-17, infra).

In these actions, public bodies and four contractors sued petitioners, alleging illegal price-fixing on asphalt and seeking treble the amount of the alleged overcharge. Petitioners are manufacturers of liquid asphalt which is sold to hot plant operators, contractors and subcontractors. Asphalt sold to purchasers who engage in the construction of highways is mixed with aggregate and becomes one of many materials used in constructing the highways. Petitioners also sell asphalt to states and public bodies for use in maintaining highways. Respondents are states and public bodies who purchase asphalt for use in maintaining highways and who also acquire completed highways, under competitive bidding, from contractors.

In all of the transactions before the court of appeals in this case, the roads and highways were acquired by respondents from contractors by receiving competitive bids and awarding the job to the contractor who submitted the lowest overall lump sum bid. No one of these transactions involved a cost-plus contract (see Appx. A, p. 4).

The contractors are responsible for doing all of the work required to "construct a finished road from clearing and grubbing through final surfacing" (R. 16776). They purchase liquid

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1. Four years later this Court reaffirmed this principle in *Hawaii v. Standard Oil Company* (1972) 405 U.S. 251, 263, fn. 14. In referring to an injury to the State in its proprietary capacity as a direct purchaser of a price-fixed product, the Court said:

> "Where the injury to the State occurs * * * through 'a payment of money wrongfully induced,' * * * damages are established by the amount of the overcharge. Under § 4, courts will not go beyond the fact of this injury to determine whether the victim of the overcharge has partially recouped its loss in some other way" (citing *Hanover* at p. 489).

asphalt from suppliers and mix this asphalt with rock aggregate to form a product known as asphaltic concrete (R. 16772). The asphaltic concrete is one of 50 to 75 items in a typical road construction project. The dollar value of the asphalt is 8.5 per cent or less of the total cost (R. 15923, 16772).

When a contractor receives an invitation to bid he prepares an estimate made up of (a) cost of material, (b) cost of equipment, (c) cost of labor, (d) company overhead, and (e) desired profit (R. 16777). While the contractor "intends and designs its estimates and any bids * * * so that they will pass on all of its expected material, labor and equipment costs" (R. 16781), the dollar amount allocated to each item in the bid is based on many considerations, including cost and the schedule or manner of payment. As a result, the dollar amount stated for each contract pay item, including asphalt, may vary from its actual cost (R. 16791). These variations are often the result of a practice called "unbalancing" of bids, under which the costs of some items are overstated and the costs of other items understated (R. 16799). Because of this, there often is no correlation between the bid price for asphalt listed on the bid tabulation and actual cost to the bidder (R. 16813). Bids are unbalanced by contractors to obtain advantages disassociated from material and other costs. These advantages include tax consequences flowing from lower or higher payments at particular times during the course of construction, a larger initial cash flow resulting from the overstatement of items first to be performed, or a higher ultimate price as a consequence of overpricing items on which an overrun is likely to occur while underpricing items as to which overruns are unlikely (R. 16812, 16818, 16762). Because of these and other factors the prices quoted in the bid for asphalt by different bidders for the same project often vary widely (R. 15928-15930). Indeed, the bid tabulations submitted by the respondent States disclose that the winning bidder (the lowest overall lump sum bidder) on approximately one half of the construction projects here involved did not quote the lowest price on asphalt (R. 15926).

The states and other public bodies are not concerned with the contractor's costs on any particular item. Their sole concern is with the lowest overall lump sum bid.[2]

Bidding upon and constructing public roads is a highly competitive, high risk business. The contractor's ultimate bid is influenced by "the type of project, the risk factors involved, the competition expected from other bidders, and [the contractor's] need for and interest in obtaining the contract" (R. 16819). "[E]stimating is an art and not a science," and "it is very common for two estimators to calculate the same job with the same material cost and arrive at different figures" (R. 16819). Because of these numerous factors which influence the contractor's decision on his final bid it can only be speculated what any particular contractor would have bid had his fixed costs on the relatively minor ingredient of asphalt been different. As Judge Winner put it in a case factually identical with the one at bar:[3]

> "On a re-paving job, the cost of the asphalt would have to be broken out of the paving bid, and inquiry would have to be made as to how that cost influenced the bid. This would not be simple, but, as compared to tracing the cost of asphalt into the cost of a 10-mile stretch of a new highway blasted out of the Colorado mountains, the problem would be child's play."

With the foregoing facts established by affidavits and pretrial discovery, petitioners moved for partial summary judgment directed to those transactions under which the public body respondents purchased completed highways pursuant to competitive bids. The motion did not apply to sales of asphalt by defendants to public bodies. The district court granted the motion on the authority of *Hanover Shoe v. United Shoe Mach.* (1968)

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2. Alasaka Stat. 19.10.170 et seq.; Ariz.Rev.Stat. § 18-113; Cal.Govt. Code § 14256; Ore.Rev.Stat. § 279.060; Rev.Code Wash.Ann. 47.28.030, 47.28.050 and 47.28.090.

3. *City and County of Denver v. American Oil Company* (D.Colo. 1971) 53 F.R.D. 620, 636.

392 U.S. 481, preserving to the respondents the right to recover on any roads constructed under pre-existing cost-plus contracts (Appx. B, p. 24). The Court of Appeals reversed (Appx. A, p. 2).

REASONS FOR GRANTING THE WRIT

The decision of the court below is contrary to the decision of this Court in *Hanover Shoe v. United Shoe Mach.* (1968) 392 U.S. 481. The decision of the court below is also in conflict with the decision of the Court of Appeals for the Third Circuit in

Mangano v. American Radiator & Standard San. Corp. (3 Cir. 1971) 438 F.2d 1187,

and is contrary to the decisions of district courts throughout the country which have followed and applied the *Hanover* case:

Wall Products Co. v. National Gypsum Co. (N.D.Cal. 1973) 1973 CCH Trade Cases, ¶ 74,461;

Albertson's, Inc. v. Amalgamated Sugar Company (D.Utah 1973) ..... F.Supp. .....;

Donson Stores, Inc. v. American Bakeries Co. (S.D.N.Y. 1973) 1973 CCH Trade Cases, ¶ 74,387;

Balmac, Inc. v. American Metal Products Corp. (N.D.Cal. 1972) 1972 CCH Trade Cases, ¶ 74,235;

City of Akron Ohio v. Laub Baking Co. (N.D.Ohio 1972) 1972 CCH Trade Cases, ¶ 73,930;

State of New Mexico v. American Petrofina, et al. (D.N.M. 1971) Civil No. 8909, unreported, attached hereto as Appendix C;

City and County of Denver v. American Oil Company (D.Colo. 1971) 53 F.R.D. 620;

Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp. (E.D.Pa. 1970) 323 F.Supp. 381;

Philadelphia Hous. A. v. American Radiator & S. San. Corp. (E.D.Pa. 1970) 50 F.R.D. 13, affirmed sub nom.

Mangano v. American Radiator & Standard San. Corp. (3 Cir. 1971) 438 F.2d 1187;

United Egg Producers v. Bauer International Corp. (S.D. N.Y. 1970) 312 F.Supp. 319.

Two of the above cases (*State of New Mexico* and *City and County of Denver*) involve factual situations identical to the case at bar. In each, the court, applying *Hanover,* held that public bodies who purchase highways under competitive bidding have no cause of action for alleged illegal overcharges on asphalt sold to the contractor.

The decision of the court below is erroneous and, unless reversed, will reintroduce into the law governing the enforcement of the Sherman Act the same conflict and confusion which existed prior to, and which was resolved by, the decision of this Court in *Hanover.*[4] The precise issue here at bar is involved in numerous

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4. This conflict was referred to by this Court in its opinion in *Hanover* (pp. 491-492, fn. 8):

> "That is where the matter stood in this Court when the issue came to be pressed with some regularity in the lower federal courts in treble-damage suits brought by customers of vendors who were charged with violating the Sherman Act by price fixing or monopolization. Some courts sustained the defense, both where the plaintiff complained of overcharging for materials or services used by him to produce his own product [citation omitted], and where the price fixing concerned articles purchased for resale [citations omitted]. Others, beginning with Judge Goodrich's 1960 decision in the case before us, deemed it irrelevant that the plaintiff may have passed on the burden of the overcharge. Recently, for example, the defense was rejected in the cases brought against manufacturers of electrical equipment by local utilities who purchased equipment at unlawfully inflated prices and used it to produce electricity sold to the ultimate consumer [citation omitted]."

One of the cases cited as authority by the court below (Appx. A, p. 9) was *Armco Steel Corp. v. North Dakota* (8 Cir. 1967) 376 F.2d 206, which was one of a group of pre-*Hanover* cases unsuccessfully relied upon by United Shoe in the *Hanover* case (see Br. for Pet., No. 463, October Term 1967, p. 66).

cases pending in the lower Federal courts. It presents an important question of Federal law which should be settled by this Court.

1. The Hanover Shoe Case.

Hanover Shoe involved an alleged overcharge for machinery used by plaintiff in the manufacture of shoes. United Shoe Machinery contended that Hanover, by increasing the price it charged for shoes manufactured with the machinery, had passed on any illegal overcharge to its customers and had suffered no injury. This Court disagreed, holding (392 U.S. at p. 489):

> "* * * We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower."

The Court pointed out that this holding was consistent with its earlier decisions under the antitrust laws[5] and with the principle stated by Mr. Justice Holmes in *Southern Pac. Co. v. Darnell-Taenzer Co.* (1918) 245 U.S. 531, 533-534:

> "The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events."

The Court recognized that an exception would exist "when an overcharged buyer has a pre-existing 'cost-plus' contract," or an

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5. *Chattanooga Foundry & Pipe Works v. City of Atlanta* (1906) 203 U.S. 390; *Thomsen v. Cayser* (1917) 243 U.S. 66. In the former decision, a case involving an alleged illegal overcharge, the Court held (203 U.S. at 396):

> "A person whose property is diminished by a payment of money wrongfully induced is injured in his property."

equivalent arrangement, "thus making it easy to prove that he has not been damaged" (392 U.S. at p. 494), but went on fully to explain the rationale of its holding that in other circumstances only the initial purchaser suffers cognizable injury (392 U.S. at pp. 492-493):

> "A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. * * * Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable."

And the Court added in a footnote (p. 493):

> "The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages."

Thus, *Hanover* establishes that where an independent pricing decision has been made by the original purchaser he is the one

entitled to recover treble the full overcharge without regard to whether he included any or all of that overcharge in the price charged his customers, either by an increase in the resale price of the product or by an increase in the price of a different product of which the price-fixed product is an ingredient. And this rule was expressly reaffirmed by this Court at its last term in *Hawaii v. Standard Oil Co.* (1972) 405 U.S. 251 (quoted supra, p. 4, fn. 1).

In the case at bar the court below refused to apply these principles, and in so doing placed an untenable interpretation on *Hanover*. The court held that although this Court's decision in *Hanover* prevents a defendant-supplier from asserting "defensively" that an overcharge has been passed on by the original purchaser (termed "defensive pass-on"), it does not prevent a plaintiff who is a customer of the original purchaser, or someone further down the line of distribution, from asserting that the overcharge has been passed on to him (termed "offensive pass-on") (Appx. A, pp. 9, 13, 14).[6] This ruling is clearly erroneous. As Judge Lord held in the *Philadelphia Housing* cases, supra (50 F.R.D. at p. 30):

> "As has been indicated previously, that reasoning [of this Court in *Hanover*] explicitly correlates rejection of the passing-on argument of defendants against one buyer with rejection of liability of those defendants to more remote purchasers * * *."

And the many cases cited above are in accord (supra, pp. 7-8).

As noted above, this Court premised its holding in *Hanover* on the "nearly insuperable difficulty of demonstrating" that an overcharge on a single item of cost would have any effect upon the resale price of a product. In this connection, the Court concluded that if the problem of attempting to trace the effect of

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6. The court's specific ruling was:
"We reverse the ruling below that the plaintiffs-appellants may not use 'passing on' as a theory of recovery."

. . . an overcharge down the chain of distribution is not eliminated . . . . . "[t]reble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories" (p. 493). These considerations are forcefully illustrated in the cases at bar, which furnish as clear an example as could exist of a situation in which it would be impossible to prove a pass-on under the principles stated in *Hanover*.[7] The issues in the hundreds of claims on direct purchases alone are extremely complex. But if the claims on completed highways purchased from general contractors by the more than two hundred public-body plaintiffs are injected, then some 37,000 road construction contracts must be considered. No two of the construction projects are the same. The task for the juries becomes literally "insuperable" should there be imposed the added burden of hearing and interpreting "massive evidence and complicated theories" concerning the mental processes and calculations of contractors in arriving at the end bid price for the completed

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7. See pp. 5-6, supra. See also *Philadelphia Hous. A. v. American Radiator & S. San. Corp.* (E.D.Pa. 1970) 323 F.Supp. 381, where plaintiffs were public bodies who contracted with general contractors for the construction of public buildings pursuant to competitive bidding. In granting a motion for summary judgment on authority of *Hanover,* the Court said (at p. 385):

> "The undisputed facts in the record here established that the present plaintiffs contracted not for the purchase of plumbing fixtures themselves but for the purchase of public buildings containing plumbing fixtures. The facts also establish that these plaintiffs did not make their purchases of the buildings under a pre-existing cost-plus contract or analogous type of arrangement. Indeed, in these cases, it is even clearer than in the homeowner cases that no cost-plus type arrangement was involved. The public bodies here entered into contracts for their finished structures as a result of sealed bids submitted by general contractors and not as a result of negotiated prices. The requirement that competitive bids be submitted necessarily demands that the contractor bear the full risk if prices are inaccurately estimated. Such an arrangement is distinctly different from the cost-plus type of contract which might permit the tracing to an end user of the increased prices paid for the fixtures in question. The facts here then do not fall within the exception noted by Mr. Justice White in Hanover (392 U.S. at 494)."

road in the light of the many intervening factors mentioned above and detailed by the court below in its description of what it termed the "esoteric process" of reaching an overall competitive bid (Appx. A, pp. 4-6).

The juries will be confronted by conflicting theories of the economists and by complex conflicting calculations of the accountants. In these areas, the common sense of the jury, which is its principal virtue, "is less available than usual to protect it" (*Herman Schwabe, Inc. v. United Shoe Machinery Corp.* (2 Cir. 1962) 297 F.2d 906, 912). To use the words of Judge Winner in another asphalt case, the situation "might be an accountant's paradise, but it would be a court's purgatory" (*City and County of Denver v. American Oil Company* (D.Colo. 1971) 53 F.R.D. 620, 637). Clearly, if the decision of the court below is allowed to stand, the juries in these cases can only reach their decisions on the basis of the accountants' and the economists' "hypothetical model" rather than the "real economic world" referred to by this Court in *Hanover* (493 U.S. at p. 481).

Contrary to the conclusion of the court of appeals, therefore, it is evident that the problem with respect to proving a pass-on is identical, whether a plaintiff or a defendant is the one asserting the pass-on. *Hanover* rejected the contention that where the first purchaser makes an independent pricing decision "sound laws of economics require recognizing" that an overcharge to the first purchaser was passed on to a subsequent buyer or consumer (392 U.S. at pp. 492-493):

> "Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price."

A fact whose ascertainment presents "insuperable" difficulties and which is too speculative to prove by a defendant (*Hanover,*

pp. 492-493) does not become provable simply because tendered by a plaintiff.[8]

The error of the court of appeals is clearly evidenced by its repeated reliance, on no less than four occasions, on an alleged "assumption" that respondents could prove that the asserted illegal overcharges had been passed on to them by the original purchasers (Appx. A, pp. 4, 7, 11, 14). Thus the court asserts that considerations of judicial economy are not pertinent "when, we must assume, proof of passing on is at hand, and in triable form" (id., p. 11). By this "assumption," however, the court simply assumed away the entire problem which was the cornerstone of the *Hanover* decision. Indeed, it is precisely this assumption—the assumption that an overcharge to an intermediary can be shown to have been passed on to a remote purchaser—that this Court in *Hanover* specifically held was unwarranted and

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8. The suggestion of the court below that *Hanover* and *Darnell-Taenzer* (supra, p. 9) "may solidify an immediate purchaser's right to damages * * * [but do] not preclude recovery by ultimate purchasers" (Appx. A, p. 9) is, so far as meaningful, directly contrary to *Hanover*. That case affirmed the right of the first purchaser to recover damages "to the extent of that overcharge" (p. 491). The court's conclusion was specific (p. 494):

> "Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; * * *"

This language also answers the misunderstanding of the court below in reading *Hanover* as holding that the first purchaser has the cause of action for the full amount of the overcharge only in a case where the ultimate consumer is not before the court (Appx. A, p. 13). This exact point was answered by Judge Lord in the *Philadelphia Housing* decision, which was affirmed by the Third Circuit in *Mangano* ("on the basis of the district court's thorough and well-reasoned opinion," 438 F.2d at p. 1188):

> "The Court [in *Hanover*] makes no attempt whatsoever to limit its statement of the rule to situations in which the party paying this increased price is not a litigant. Instead the Court sets forth an explicit rule that, except in the special circumstances described, proof that the buyer asserted to have passed on the loss did not recoup the excess cost by raising his own price is simply not an element of that buyer's case" (50 F.R.D. at p. 30).

impermissible absent a pre-existing cost-plus contract or its equivalent (392 U.S. at pp. 492-493, quoted supra, p. 10). In the present case, pre-existing cost-plus contracts or equivalent arrangements are not in issue. The "assumption" of the court of appeals with respect to the other contracts is, therefore, in direct conflict with *Hanover*.[9]

The error of the court below is further evidenced in its ruling on damages. Conscious that double or multiple (trebled) damages cannot be imposed in respect of each transaction in the chain of distribution, the court held that damages should be apportioned between the intermediaries and the ultimate consumers (Appx. A, p. 15):

> "Thus in passing-on cases, the intermediary should recover the amount of the overcharge that was not passed on * * *. The ultimate purchasers should obtain the remainder of the overcharge * * *. Facts raising reasonable inferences, based upon appropriate market data, should suffice to go to the jury on these questions."

But this ruling imposes an impossible task on the jury (see p. 13, supra) and completely ignores the express holding in *Hanover* and the rationale behind it. As this Court there held, where the original purchaser makes an independent pricing decision for

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9. The district court sustained all claims under pre-existing cost-plus contracts and they were not at issue in the court of appeals (Appx. A, p. 4). The court of appeals' own description of the remaining contracts (Appx. A, pp. 4-5) and the evidence of record (summarized pp. 4-6, supra) demonstrate that they are in no way the equivalent of a cost-plus contract, and neither court below purported to find that they are.

The court of appeals purported to base its assumption on what it assumed to be the identical "assumption" of the district judge (Appx. A, p. 7, fn. 5). Even if the opinion of the district court, which specifically held that the "proof problems suggested by *Hanover* are present here" (Appx. B, pp. 23-24) and accordingly *granted* summary judgment for petitioners, could be so read, any such assumption is improper under *Hanover* absent a cost-plus contract or equivalent. The asserted "assumption" of the district court therefore would do nothing to rectify the equally erroneous "assumption" of the court of appeals.

the resold commodity, or for a commodity in which the overpriced product is an ingredient, it is the original purchaser who suffers injury in the full amount of the overcharge. This is so because the impact of the full overcharge falls upon him and it is impossible to prove that the overcharge was passed on. It follows, of course, that there is no possible way of proving that a *portion* of the overcharge was passed on. If the decision of the court below were correct it would have been open to United Shoe Machinery Company in *Hanover* to go to the jury on the question whether, and if so in what proportion of the total, the overcharge had been passed on to Hanover's customers—the very point decided against United Shoe by this Court.

A strong motivation for the result reached by the court below is apparent from its expressed concern that the suits by the contractors in this case do not cover all of the transactions, and that, therefore, an application of the *Hanover* rule would result in defendants retaining some of their "assumed illegal profits" (Appx. A, pp. 10, 11). But the treble damage action is governed by section 4 of the Clayton Act. The Government may impose fines and imprisonment, but section 4 provides only for trebled compensation to the one injured. It does not provide a trebled overcharge penalty which must be paid to someone, if not to the one injured, then to someone else.[10] This Court in *Hanover* took cognizance of

10. It is clear that double liability cannot, in fact, be avoided if separate juries are permitted to speculate on the amount of the overcharge paid by each purchaser in a succession of markets. The imposition of double liability would be contrary to this Court's holding in *Hawaii* (405 U.S. at pp. 262-264). Perhaps conscious of this fact, the court below suggested that double recovery can be avoided by application of the doctrines of *res judicata* and collateral estoppel, by statutory interpleader, or by the running of the statute of limitations (Appx. A, p. 16). But neither *res judicata* nor collateral estoppel can preclude a party from his day in court, notwithstanding that the identical issue has been litigated in suits between other parties (*Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation* (1971) 402 U.S. 313, 329). Interpleader would be ineffective since, even if there were any requirement in law that a defendant when sued by one party must voluntarily bring in every other possible claimant,

the fact that a rule of law giving the cause of action to the first purchaser ordinarily will favor those most likely to press claims (392 U.S. at p. 494). But if in a particular situation this should happen not to be true, still the cause of action given by section 4 to the one injured cannot shift whimsically to another if the one possessed of the cause of action elects not to assert it.[11]

2. The Conflict with the Third Circuit and the Importance of the Question.

Mangano v. American Radiator & Standard San. Corp. (3 Cir. 1971) 438 F.2d 1187, was a suit by homeowners, commercial building owners and apartment building owners to recover alleged illegal overcharges by manufacturers of plumbing fixtures which were used in the construction of their houses and buildings, but which initially had been sold to wholesalers and plumbing and building contractors. The district court held that *Hanover Shoe* precluded recovery by plaintiffs as a matter of "substantive law." The Third Circuit affirmed, holding that "absent a showing by the plaintiffs that their purchases were made 'pursuant to a preexisting cost-plus contract or analogous fixed markup type of arrangement,' * * * it is appropriate, in light of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 1968, 392 U.S. 481 * * * to

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this would literally be impossible in a price-fixing case involving purchasers, subpurchasers and sub-subpurchasers in a market which might be as much as nationwide. Finally, the statute of limitations might or might not protect against multiple liability (particularly if government actions were pending), but, in any event, under any rational rule of law the right to maintain a cause of action cannot shift from one possessed of it to another not possessed of it because, and whenever, the possessor elects not to pursue it.

11. The court below was also influenced by its assumption that many of the contractors are controlled by defendants and cannot, therefore, be expected to bring suit (Appx. A, pp. 6, 10-11, 12). There is nothing in the record to show that petitioners exercise control over the general contractors engaged in constructing highways. However, the point is not important at this stage of the case since the court below indicated that its decision would be the same even if the contractors were wholly independent of respondents (Appx. A, p. 12).

dismiss those three cases" (438 F.2d at p. 1188) *Mangano* is thus in direct conflict with the decision of the court below.[12] The many decisions of the lower Federal courts cited above are in accord with *Mangano*.

Literally hundreds of cases pending in the lower Federal courts involve the issue here presented; indeed, it is present actually or potentially in every price-fixing case. While virtually all of the cases decided since *Hanover* have followed that decision and are, therefore, contrary to the decision of the court below, a short memorandum decision by the district court in Florida (*Southern General Builders, Inc. v. Maule Industries Inc.* (1972) 1973 CCH Trade Cases, ¶ 74,484 (not officially reported) and a recent decision of the district court in Connecticut (*In re Master Key Antitrust Litigation* (Aug. 23, 1973) 1973 CCH Trade Cases, ¶74,680) reach a conclusion similar to that of the court below. These decisions, and in particular the decision of the court below in this case, raise again the widespread uncertainty and confusion which *Hanover* was thought to have settled.[13] We respectfully submit that the question involved warrants the exercise of this Court's supervisory jurisdiction.

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12. The court below sought to dispose of this decision by characterizing it as standing merely "for the procedural point that failure to answer interrogatories may result in adverse determination of the issues which were the subject of that discovery" (Appx. A, p. 10, fn. 6). But the issues which were taken as established because of the failure to make discovery were the exact issues established in the case at bar, namely, (a) that the plaintiffs in the three cases did not buy plumbing fixtures but instead bought houses containing such fixtures, and (b) that plaintiffs did not buy the houses under a " 'preexisting cost-plus contract or analogous fixed markup type of arrangement' " (Op. of the district court, 50 F.R.D. at p. 19). In its opinion the Third Circuit did say that the failure of plaintiffs to make appropriate discovery was in itself sufficient to warrant dismissal of the cases but went on expressly to hold—in the interest of facilitating the conclusion of the massive plumbing fixture litigation—that, as a matter of "substantive law," the plaintiffs did not have a cause of action under *Hanover Shoe*.

13. See Handler, 21st Annual Antitrust Review, 57 Cal.Law. Rev. 182, 207-212.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals

for the Ninth Circuit

No. 73-1086

In Re Coordinated Pretrial Proceedings In
Western Liquid Asphalt Cases
State of Alaska, Et Al.,
Plaintiff-Appellants,

vs.

Standard Oil Company of California,
Defendant-Appellees.

JUDGMENT

Appeal from the United States District Court for the Northern District of California.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered October 3, 1973

United States Court of Appeals

for the Ninth Circuit

No. 73-1086

In Re Coordinated Pretrial Proceedings In
Western Liquid Asphalt Cases
State of Alaska, Et Al.,
Plaintiffs-Appellants,

vs.

Standard Oil Company of California, Et. Al.,
Defendants-Appellees.

OPINION

[October 3, 1973 as amended on November 30, 1973]

Appeal from the United States District Court
Northern District of California

Before: CARTER and GOODWIN, Circuit Judges, and FERGUSON,* District Judge.

JAMES M. CARTER, Circuit Judge:

This interlocutory appeal was allowed under 28 U.S.C. § 1292(b), from an order of the district court granting partial summary judgment to defendants-appellees. In re *Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases* (N.D. Cal. 1972), 350 F. Supp. 1369.

Appellants[1] brought these actions for damages and injunctive

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*Hon. Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.

1. Numerous states, cities, counties, and special districts, and a few contractors, brought suit. The actions were consolidated in the Northern District of California by the Multidistrict Litigation Panel, pursuant to 28 U.S.C. § 1407. In re *Western Liquid Asphalt* (J.P.M.L. 1970) 309 F. Supp. 157; (1969) 303 F. Supp. 1053.

relief[2] under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. Appellants allege that appellees, suppliers of asphalt, illegally raised and stabilized the price of liquid asphalt, which is used in the construction of public roads, through a conspiracy to fix prices, to submit rigged and collusive bids, to allocate and stabilize the relevant market, and otherwise to eliminate competition. For purposes of summary judgment, these allegations must be assumed to be true.

The district court held[3] in substance that appellants, who indirectly purchased an assumedly price-fixed product through con-

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Appellants herein are the states of Alaska, Arizona, California, Oregon, and Washington, who purchased both directly and indirectly (through contractors) from appellees, and who appealed under 28 U.S.C. § 1292. Other plaintiffs, who purchased only indirectly, appealed under § 1291. The order appealed from lacked the requisite certificate under *Fed.R. Civ.P.* 54(b). For that reason, a motions panel of this court dismissed the appeals of these latter plaintiffs, without prejudice to refiling if the required certificate were obtained from the district court. None have refiled.

2. The district court's opinion below discussed only 15 U.S.C. §§ 1, 15, which together relate solely to damages, and the motion for partial summary judgment relates to damages. 350 F. Supp. at 1370. However, the court's holding, *see* note 3 *infra,* denies appellants *"all relief* based upon indirect purchases," inter alia. 350 F. Supp. at 1373 (emphasis added). We construe this to mean damages only, not injunctive relief, and our opinion is concerned only with the damages issues. However, it is appropriate to note that the requirements for standing regarding injunctive relief under 15 U.S.C. § 26 are different and less stringent in some respects than those for damages under § 15. In re *Multidistrict Vehicle Air Pollution M.D.L. No. 31* (9 Cir., No. 71-1241, June 4, 1973), slip op. at 11-12, ... F.2d ..... at .....

3. The district court's precise ruling reads:

> "The defendants' motion for summary judgment is granted and plaintiffs are denied all relief based upon indirect purchases of liquid asphalt, except in those cases where the indirect purchases of liquid asphalt were made upon pre-existing cost-plus contracts, that is, contracts wherein the plaintiffs agreed to pay the contractors' costs, whatever they may be, plus a fixed percentage.
>
> "In my opinion this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the termination of this litigation. Proceedings shall not be stayed unless by order of the court of appeals." 350 F. Supp. at 1373.

tractors, and who are assumed to be able to show that at least part of the illegal overcharge was passed on to them, are precluded as a matter of law from recovering such damages as they ultimately might be able to prove. The court relied for its decision upon *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). We reverse.

Facts

The facts are not seriously in dispute. Some of appellants' purchases of liquid asphalt were made directly from appellees. In those instances, the liquid asphalt alone was obtained for application by appellants in road maintenance work. Such direct purchases are not involved in this appeal.

In other instances, the asphalt was only a part of the product supplied to appellants by its contractors after combination with other ingredients, in a road construction project. These purchases were made in one of two ways. Some were made through pre-existing cost-plus contracts, in which appellants agreed to pay the cost of materials as charged to the contractors by suppliers, plus a charge for the contractors' services. In others, however, the contractors obtained bids from suppliers, then computed their own, overall bid. The appellants then awarded particular projects to the lowest bidder among responsible contractors. The claims under direct and cost-plus purchases survived the motion granted below, and only the remaining indirect purchases are involved in this appeal.

Affidavits submitted by appellants reflect that the usual bidding process, not disputed in substance by appellees, involves certain common steps. The contractor totals suppliers' sub-bids, adds an amount for his services, including labor and other overhead, and an amount for profit. The total is then re-divided and apportioned to each supply item, but the dollar amount so allocated to each item varies depending on factors such as cost, and method of payment. The overall bid, including allocations to each supply item, is

then submitted in competition for the particular project.[4] A contractor is not interested in the level of the price charged by suppliers, so long as he receives as least as low a rate as his competitors.

Occasionally a contractor will use a paving subcontractor, in which case the subcontractor prepares his sub-bid in the same general manner as do contractors. In any case, sub-bids from suppliers and subcontractors are regarded as firm.

Appellees also monitor schedules of future road projects, and from time to time offer quotations to contractors, by which they offer to supply materials such as asphalt at a specific price for a particular project only. Also, appellees manufacture asphalt to comply with specifications published by the governmental bodies, and so certify to the contractors.

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4. In further explanation of this somewhat esoteric process, we quote from one of the affidavits on the subject submitted by appellants, that of William Corn, Manager of Estimating, Highway and Marine Division, of a construction contractor, and a registered engineer.

> "1. Each public road construction contract is composed of a number of separate items of work. Each item of work typically is composed of certain material and labor costs. Certain items may also involve equipment costs.
>
> "2. The company uses a work sheet to compute the lowest cost to complete each item of work set forth in the contract. The company, in making its computation, ascertains in regard to each item, the actual cost, to the extent applicable, of the material, labor and equipment involved. The cost of those items of work to be covered by a subcontract, such as paving, is ascertained by obtaining bids from one or more subcontractors.
>
> ". . . .
>
> "5. The total bid price is arrived at by adding the costs computed for each item of work and by adding thereto additional amounts for overhead, contingencies and profit. These amounts vary from job to job.
>
> "6. Each contract bid form contains a number of contract 'pay items'. Typical contract 'pay items' are '..... tons, liquid asphalt, MC250', and '..... tons, aggregate'. Once the total bid price is computed, it is divided and spread among the various contract pay items. The dollar amount allocated to each contract pay item is based on many considerations, including cost and the schedule or manner of payment. As a result, the dollar amount stated for each contract pay item, including asphalt, may vary from its actual cost. . . ."

In addition, documents obtained from appellees during discovery tend to indicate that they control a high percentage of their direct customers of asphalt, either through acquisition of stock, or indirectly through various financial arrangements, including credit.

Appellants contend that the cost of asphalt to the contractor, including allegedly illegal overcharges, is always passed on to them as the ultimate purchasers. Appellees take the position that it is only the initial purchaser—the contractor—who is damaged. Any increase paid by the ultimate purchasers, they say, is too remote from the alleged overcharges to be susceptible of proof.

I.

Standing and Liability

The district court said, 350 F. Supp. at 1370-71, that it would rule for appellants, were its decision not controlled by *Hanover Shoe, supra,* 392 U.S. 481. That case held that a supplier being sued by an immediate purchaser for alleged overcharges (in violation of antitrust laws) cannot raise a defense that the immediate purchaser may have recovered all or part of the overcharges by passing them on to his customers.

In *Hanover Shoe,* however, the product involved, shoe machinery, was not itself resold by plaintiffs. The Supreme Court's decision was based in part upon the difficulty of showing whether plaintiff shoe manufacturer's pricing decisions for shoes reflected the illegal overcharge.

> "Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the charge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually

> unascertainable figures, the task would normally prove insurmountable. [Footnote omitted.] On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability [thus requiring long and complicated proceedings]." 392 U.S. at 493.

Clearly the Court's purpose was to preserve the private antitrust suit and promote compensation to those injured. This purpose could not be achieved with the hindrance of a defense, the proof of which it felt would normally present "insuperable difficulty," but the mere allegation of which would often lengthen antitrust litigation beyond reasonable bounds.

On the other hand, the Court recognized

> ". . . that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present." *Id.* at 494.

The Court thus left open for future decision, cases in which the passing on of the illegal overcharge might be more readily demonstrable. Ours is such a case. Based on affidavits, the district court assumed that appellants could so show.[5]

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5. The district court felt that the complexities of proof of damages, mentioned in *Hanover Shoe, supra,* were present in this case. 350 F. Supp. at 1372 & n.1. The court said that if appellants were to make out a prima facie case of damages, then it could not prevent appellees from showing that in particular instances no overcharge was passed on. "This means, of course, an examination of each contract. Whatever else, the effect of *Hanover* and *Darnell-Taenzer* is to reject the generalism that because the first in the purchasing chain suffers an overcharge someone late in the chain suffers compensable damage." *Id.* at 1372 n.2.

It may be that the Supreme Court has ruled out generalized damages claims. But it has inferentially approved specific ones, and we cannot square this with the district court's own statement that "plaintiffs [appellants] can in some instances prove that the increased cost . . . was in fact borne by the plaintiffs." *Id.* at 1370. As we have said, the court has at its disposal several means of inquiring into each contract, if necessary,

The district court held "that an immediate purchaser may recover and that a remote purchaser may not even though the former suffers no money loss and the latter does . . . ." 350 F. Supp. at 1372. The court relied heavily for that conclusion upon *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), a case under the Interstate Commerce Act. The Supreme Court discussed *Darnell-Taenzer* in its *Hanover Shoe* opinion, 392 U.S. at 488 n.6, 490 & n.8, noting that it was a case in which "the possibility that plaintiffs had recouped the overcharges from their customers was held irrelevant in assessing damages." 392 U.S. at 490. At that point in its opinion, however, the Court was simply describing "where the matter stood in this Court when the issue came to be pressed with some regularity in the lower federal courts . . . ." *Id.* at 491 n.8. It appears obvious to us that the Supreme Court was not enshrining privity as a requirement of the antitrust laws. *See Missouri v. Stupp Bros. Bridge & Iron Co.* (W.D. Mo. 1965) 248 F. Supp. 169, 171-75; *Boshes v. General Motors Corp.*, Trade Reg. Rep. (1973 Trade Cas. ¶ 74,483, at 94,146-47 (N.D. Ill. 1973).

The *Darnell-Taenzer* case was decided at a time when privity was a requirement of tort law. Today, it stands at best for the concept that an offense is complete at the time of injury, regardless of the victim's later acts in mitigation. Note, 46 S. Cal. L. Rev. 98, 102-04, 109-10 (1972). Privity is not required in antitrust cases. In re *Multidistrict Vehicle Air Pollution M.D.L. No. 31* (9 Cir.,

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without the need to completely foreclose recovery on grounds of difficulty of trial. It has never been thought that an antitrust violation is irremediable because done on a grand scale. The Supreme Court spoke of "virtually unascertainable figures" associated with proof that a particular intermediary "could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued." *Hanover Shoe, supra,* 392 U.S. at 493. This was in relation to the *liability* issue, which in our case is obviated by the district court's assumption that appellants could prove an illegal overcharge which was passed on to them. We have elsewhere mentioned the relaxed proof requirements on the *damages* issue in antitrust cases. The district court denied appellants *standing* on grounds of remoteness and judicial convenience, a third and distinct issue with which our opinion deals.

No. 71-1241, June 4, 1973), slip op. at 9, ... F.2d ..... at .....; *South Carolina Council of Milk Producers, Inc. v. Newton* (4 Cir. 1966), 360 F.2d 414, 417-18, cert. den., 385 U.S. 934 (1966); *see Perkins v. Standard Oil Co. of Calif.*, 395 U.S. 642, 648-50 (1969); Comment, 72 Colum. L. Rev. 394, 396-403; Note, 46 S. Cal. L. Rev. 98, 110 & n.47 (1972). Recovery was allowed in a pre-*Hanover Shoe* case markedly similar to ours. *Armco Steel Corp. v. North Dakota* (8 Cir. 1967) 376 F.2d 206, 210-11. Therefore, while *Darnell-Taenzer* may solidify an immediate purchaser's right to damages, it does not preclude recovery by ultimate purchasers. In fact, nowhere in *Hanover Shoe* does the Supreme Court mention standing, which is our problem herein.

Our case, then, involves "passing on," not as a defense, but as a theory of recovery in the nature of an offense. Here we are directly confronted with the policy favoring the allowance of recovery to appellants who can prove both the occurrence of an antitrust violation and that they each thereby incurred substantial damage. Speaking of the ultimate consumers in *Hanover Shoe*, who were retail purchasers of shoes, the Supreme Court noted that they would each have

> ". . . only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." *Id.* at 494.

In our case, this policy favors permitting appellants to demonstrate injury by reason of any passed-on overcharge. The district court squarely held that standing under § 4 of the Clayton Act is limited exclusively to first-line purchasers unless there is a pre-existing cost-plus contract, even assuming that second-line pur-

chasers would be able to show in some instance that they were the ones who bore the burden of the illegal overcharge.[6] We think that result reads *Hanover Shoe* too literally.

We do not have a case of consumers who have only a minuscule interest in the outcome of the litigation. Instead, appellants are a large number of public consumers of liquid asphalt, who allege that illegal overcharges by appellees resulted in unlawfully high prices to them, for about three million tons of asphalt purchased in some 37,000 contracts. To permit so large a fish to escape the nets is unthinkable.

Moreover, most of the contractors who purchased from appellees and resold to appellants have not come forward to challenge these alleged violations. Counsel at oral argument pointed out that only

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6. *See* note 3 *supra*. The issue herein has been raised in other cases. In *Minnesota v. U.S. Steel Corp.* (8 Cir. 1971), 438 F.2d 1380, 1384, the issue was not decided because it was not ripe, and necessary facts were lacking. In *West Virginia v. Chas. Pfizer & Co., supra,* 440 F.2d at 1086-88, the Second Circuit reached a result similar to ours, in determining the proper apportionment of a $100 million settlement offer. The court did not reach the issue herein as a matter of standing, but its discussion is apt.

In *Mangano v. American Radiator & Std. San. Corp.* (E.D. Pa. 1970) 50 F.R.D. 13, aff'd, 438 F.2d 1187, 1188 (3 Cir. 1971) (per curiam), dismissal was *affirmed* against ultimate purchasers, for failure to prove that the alleged overcharge was "a *causa sine qua non* of any payment" they made. However, plaintiffs there had failed to comply with the district court's discovery order, and the case stands for the procedural point that failure to answer interrogatories may result in adverse determination of the issues which were the subject of that discovery.

In the same litigation, the claims of public bodies, who bought plumbing fixtures allegedly subject to illegal overcharges, were dismissed because the fixtures had been incorporated into buildings and reached plaintiffs only through several levels of intermediaries. *Philadelphia Housing Authority v. American Radiator & Std. San. Corp.* (E.D. Pa. 1970) 323 F. Supp. 364 and 381. The court there found that the product had passed through several successive unrestrained markets, with independent pricing decisions at each different level. *Id.* at 385. Such facts indicate in their statement that that case was far different from ours.

A result similar to ours was reached in *Boshes v. General Motors Corp.*, Trade Reg. Rep. (1973 Trade Cas.) ¶ 74,483, at 94,142 (N.D. Ill. 1973); *see also* Comment, 72 Colum. L. Rev. 394 (1972); and was likewise reached in the case of *In Re Master Key Antitrust Litigation* (D. Conn., August 23, 1973, M.D.L. Docket No. 45), ... F. Supp. ..... (?).

one contractor in California,[7] and three in Oregon, have sued appellants—a very small percentage of those involved. No contractors have sued in the states of Arizona, Alaska, and Washington. It is most likely that the four-year statute of limitations, 15 U.S.C. § 15b, has run on those who have not sued. It is understandable that contractors might not sue, in view of (1) their alleged dependence upon appellees for their supply of asphalt, (2) the possibility that they earned a percentage profit on the overcharges, and (3) the control and interdependence alleged between appellees and the contractors. Thus if the present appellants could establish antitrust violations but were precluded from recovering, no one else would sue, and appellees would retain their assumedly illegal profits.

Appellees object that if appellants are permitted to recover, there is a danger of double recovery, since contractors would also have a cause of action. First, this is fallacious because it assumes that contractors will sue, when in fact they have not in the vast majority of these cases. Second, there is no reason why appropriate means cannot be found to properly apportion such damages as ultimately may be assessed, a matter which we shall mention again later. Third, *Hanover Shoe* was concerned with a defense to liability, not with standing, and not with apportionment of damages. We do not believe that the Supreme Court intended a *per se* rule with respect to passing on, as can be seen from the language quoted above. The Court was applying policy to a specific case. We do not think we should sacrifice enforcement of the antitrust laws in this case in favor of considerations of judicial economy when, we must assume, proof of passing on is at hand, and in triable form.

We have recently held that standing in antitrust cases involves a two-step analysis: "identification of the affected area of the economy and then the ascertainment of whether the claimed injury occurred within that area." *In re Multi-district Vehicle Air Pollu-*

7. The California contractor's case is now pending on appeal in this Court. *Copp Paving Co., Inc. v. Gulf Oil Co.* (9 Cir., No. 72-2152), argued the same day as our case.

tion M.D.L. No. 31 (9 Cir., No. 71-1241, June 4, 1973), slip op. at 10, ... F.2d ..... (Petition for cert. filed sub nom. *Morgan v. Auto Manufacturers Ass'n,* No. 73-394, 41 U.S.L.W. 2685.)

We think that appellants here are clearly within the area of the economy which appellees reasonably could have or did foresee would be endangered by the breakdown of competitive conditions. *Twentieth Century Fox Film Corp. v. Goldwyn* (9 Cir. 1964) 328 F.2d 190, 220, *cert. den.,* 379 U.S. 880; *Conference of Studio Unions v. Loew's, Inc.* (9 Cir. 1951) 193 F.2d 51, 54-55, *cert. den.,* 342 U.S. 919 (1952). We have previously refused to defeat a cause of action for antitrust violations, merely because the violator chose to deal through intermediaries. *Karseal Corp. v. Richfield Oil Corp.* (9 Cir. 1955) 221 F.2d 358, 364-65; *see* Note, 46 S. Cal. L. Rev. 98, 110 & n.47 (1972). The broad social object of the antitrust statutes is to end anticompetitive acts in the most comprehensive way. *Karseal, supra,* at 365. Where the operation and effect of anticompetitive practices was upon the market in which appellants dealt—the "target area"—we found liability. *Id.* at 364.

Here, appellees dealt through intermediaries, the contractors, who, it is claimed, were in various ways controlled by appellees. That is sufficient to bring this case within our holding in *Karseal, supra. See Multidistrict Vehicle Air Pollution, supra,* pp. ..... to ..... Even if the contractors were wholly independent of appellees, however, the Supreme Court has indicated that it may impose liability in those circumstances. *Perkins v. Standard Oil Co. of Calif.,* 395 U.S. 642, 647-48 (1969). The question of standing is a question of law for the court. The presence of intermediaries does not bar recovery.

On the other hand, the problems of damages and causation are questions of fact for the jury. *Mulvey v. Samuel Goldwyn Productions* (9 Cir. 1970) 433 F.2d 1073, 1075 n.3. Evidence that a price advantage was "passed on, at least in part" to plaintiff's

competitor, inter alia, provides sufficient substance for the question of causation to be submitted to the jury. *Perkins*, at 648-49.[8]

The Court has held that a retailer who buys through a wholesaler could be considered a "customer" of the original supplier under the Clayton Act. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968) (§ 2(d) of the Act); *Perkins, supra*, 395 U.S. at 647 (§ 2(a) of the Act). Any other result "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain." *Perkins, supra*, at 647. This policy not to defeat recovery merely because a defendant has sold through intermediaries is also reflected, we believe, in *Hanover Shoe, supra*, where without the ultimate consumer at bar, the intermediary was allowed to recover. *See West Virginia v. Chas. Pfizer & Co.* (2 Cir. 1971) 440 F.2d 1079, 1087-88, *cert. den.* sub nom. *Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871.

The antitrust laws are to be construed so as to achieve the broad goals which Congress intended to effectuate. *Fred Meyer, Inc., supra*, 390 U.S. at 349. One such policy goal is that there be no hiatus in the enforcement of these laws. *See Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 136, 138 (1968). Each individual who is injured may sue. *Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. 251, 263 (1972). Thus, while we should not impose multiple liability upon defendants, nor give recovery to uninjured plaintiffs, neither should we bar recovery to those who can demonstrate that they bore the burden of the violation. We therefore hold that in the circumstances of this case, the granting of summary judgment to appellees on the damage claims was improper. Of course, facts await proof at trial.

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8. The Supreme Court has often cautioned against the use of summary judgment in complex antitrust litigation. *E.g., Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1968) (per curiam); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962) (per curiam); *Poller v. CBS*, 368 U.S. 464 (1962); *see White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

Our holding is limited. We reverse the ruling below that the plaintiffs-appellants may not use "passing on" as a theory of recovery.

We do not risk the danger of multiple recovery. We discuss the problem in Section II, *infra.*

We note here that three limitations on antitrust actions will continue to operate so as to prevent or alleviate the problems raised by appellees: (1) standing, (2) proper allocation of damages, and (3) the usual rules of law relating to proof of causation and damages.

Standing, which we discussed *supra,* is still in the course of development in the law. *See Conference of Studio Unions v. Loew's, Inc., supra; Karseal Corp. v. Richfield Oil Corp., supra; Twentieth Century Fox Film Corp. v. Goldwyn, supra; In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, supra.*

II.

Damages

Because on remand the district court may reach the question of damages, we elucidate somewhat further. Although appellants may have difficulty proving damages, our decision shows that we believe they should have an opportunity to do so. There is no reason to hold as a matter of law that they paid no part of the overcharge, and thus cannot recover—especially since that payment was assumed below.

To effectuate the policy of private antitrust enforcement, the cause should proceed on the liability issues, where injury is clearly not remote under the proximate causation analysis of the *Multidistrict Vehicle Air Pollution case,* and *Karseal, supra.* Problems of the apportionment of damages, as between an intermediary and an ultimate consumer, may be treated after liability is established, unless it be clear that no ultimate consumer was damaged.

If an intermediary is shown to have been damaged by payment of an illegal overcharge which was not passed on to ultimate consumers, appellees' liability to ultimate consumers, to that extent, may be decreased.

Direct proof of payment is not required, of course, because to require it could prevent enforcement of the antitrust laws. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946). If an illegal overcharge is proved, then the court can inquire whether the intermediaries paid it. If not, then obviously appellants paid it, and should recover.

However, the amount of the overcharge is not necessarily the total amount of harm to plaintiffs. Purchasers may also have been damaged by being forced to turn to substitute goods, or to discontinue purchasing the price-fixed product. The essence of conspiracy is that the conspirators believe they will recover more from the illegal overcharge than they will lose from diminished sales. *Hanover Shoe, supra,* 392 U.S. at 492-94, indicates that the measure of damages includes lost profits. Thus, in passing-on cases, the intermediary should recover the amount of the overcharge that was not passed on, if the proof shows that the ultimate consumers did not pay it all, and any lost profits resulting from increased costs. The ultimate purchasers should obtain the remainder of the overcharge, and any other damages proximately caused. Facts raising reasonable inferences, based upon appropriate market data, should suffice to go to the jury on these questions. *See Bigelow, supra,* at 264.

The trebling of damage awards should present no difficulty to the apportionment of damages. It is similar to punitive damages paid by a tortfeasor whose act injures several people. Single damages are assessed in the antitrust case, apportioned among plaintiffs if necessary, and then trebled. Damages must be trebled in this manner to effectuate the legislative judgment of Congress that

each person injured should recover three times the damages he has suffered.[9]

It is urged that our decision for appellants would result in requiring appellees to twice pay treble damages. As we have said, the amount of the overcharge is not subject to double payment, because appellees' liability in that regard is to be apportioned after the amount of the overcharge is fixed. Further, each plaintiff (including appellants), be he intermediary or ultimate consumer, will be awarded only such further damages, including lost profits, as he may reasonably prove allocable to him.

We therefore see no problem of double recovery, and we believe that if this difficulty should arise in some other connection, the district court will be able to fashion relief accordingly. In addition to the court's control over its decree, numerous devices exist. We note that the consolidation of cases, which has already occurred, is one means of averting duplicitous awards. The short, four-year statute of limitations is another; later suits, after final judgment herein, are unlikely. 15 U.S.C. § 15b. In other cases, it may be that statutory interpleader, 28 U.S.C. § 1335, could be used by antitrust defendants to avoid double liability. If necessary, special masters may be appointed to handle complex cases. Finally, there are the doctrines of res judicata and collateral estoppel and procedures for compulsory joinder. The day is long past when courts, particularly federal courts, will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages. *See Boshes, supra,* at 94, 147-48.

Reversed and remanded for further proceedings in accordance with this opinion.

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9. 15 U.S.C. § 15 reads:
   "*Any person* who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue therefor . . . and *shall recover threefold the damages by him sustained* . . . ." [Emphasis added.]

See generally In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, supra, slip. op. at 3-4, ... F.2d at .....; Comment, 76 Colum. L. Rev. 394, 397 (1972).

Appendix B

In re Coordinated Pretrial Proceedings
in WESTERN LIQUID ASPHALT
CASES.

Master File No. 50173 RES Civ.

United States District Court,
N. D. California.

Nov. 30, 1972.

OPINION AND ORDER*

RUSSELL E. SMITH, District Judge.

Plaintiffs, various states and municipalities, bring this action under the Sherman Act charging the defendant oil companies with conspiracies to fix the prices of liquid asphalt in violation of the Sherman Act (15 U.S.C. § 1). Plaintiffs make direct purchases of liquid asphalt for use in paving projects carried on by such plaintiffs with their own employees and, by letting public projects by means of competitive bidding, indirectly purchase asphalt in the form of the finished projects. Damages are sought on account of both the direct and indirect purchases.

Defendants, by motion for partial summary judgment, seek an adjudication that plaintiffs may not recover damages based upon the indirect purchases. In the case of an indirect sale the asphalt moves from the defendant supplier to a private contractor who mixes the asphalt with aggregate and applies the resultant asphaltic concrete to the surface to be paved. On any one project there may be one or more contractors (depending upon the number of subcontractors involved) between the initial supplier and the public authority involved. The plaintiff will be able to prove that in some jobs the contractor who was the successful bidder aggregated all of the fixed costs of items such as asphalt, pipe, guard

*This Document relates to all Actions presently coordinated except Nos. 49808, 49638, 50307, and C–71–606.

rail, estimated the cost of labor and equipment use, and then added percentages for overhead and profit, totaled the whole, and thus arrived at the bid price. In short, plaintiffs can in some instances prove that the increased cost (assuming, of course, proof that a conspiracy did result in an increased cost) of asphalt was in fact borne by the plaintiffs.

Defendants take the position that except in the case of cost-plus contracts the initial supplier of the asphalt is the one damaged and that plaintiffs may not recover even if they can show that the increased prices were in fact passed on. Plaintiffs contend that the costs are always passed on and that once it is shown that the cost to a plaintiff's contractor was increased by a conspiracy the plaintiff may recover.

Were I confronted with the facts here (assuming a conspiracy-controlled market) and the law—"Any person who shall be injured . . . by reason of anything forbidden . . . shall recover. . . ." (15 U.S.C. § 15)—I would, if not otherwise controlled, conclude, first, that one who purchased for resale in the same or a different form and passed the excess price along is not injured, and, second, that the ultimate consumer of an article the price of which is increased by antitrust activity is injured.

But I am controlled. My first conclusion is not now permissible in view of Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), and my second conclusion may not be.

In *Hanover* the courts had before them a corporation which supplied 75% to 95% of all of the shoe manufacturing machinery used in the United States. It did so on a leasing basis which permitted each manufacturer of shoes closely to approximate the costs of every other manufacturer using the same machinery. United States v. United Shoe Machinery Corp., 110 F.Supp. 295 (D.Mass. 1953). In short, the shoe machinery market was a controlled market in which a uniformly high price was maintained. With

this background, however, the district judge who tried *Hanover* (Hanover Shoe, Inc. v. United Shoe Machinery Corp., 185 F. Supp. 826 (M.D.Pa.1960)) refused an offer to prove that the overcharges were in fact passed on and that plaintiff did not actually suffer a money loss. In other words, the district court refused to equate a money loss with recoverable damages. This result is based upon the proposition that the law considers immediate and not remote consequences.

The Third Circuit affirmed on the basis of the opinion below. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 281 F.2d 481 (3d Cir. 1960). The Supreme Court affirming did not by the affirmance alone decide that a remote purchaser could not recover because that fact issue was not before it. It is necessary, therefore, to determine whether the rule which the Supreme Court announced in reaching its result would forbid recovery by the remote purchaser. The matter is not free from doubt, but I conclude that it did.

In its opinion in *Hanover* the Supreme Court did not express any disapproval of the rule announced by the district court. On the contrary it quoted with apparent approval from that portion of the district court opinion expressing the remote consequences rule. Hanover Shoe, Inc. v. United Shoe Machinery Corp., *supra,* 392 U.S. at 488, n. 6, 88 S.Ct. 2224. This plus the fact of affirmance on the "pass-on" issue leads me to believe that the Court approved the rule announced by the district court.

Additionally the Supreme Court in *Hanover* relied upon the decision in Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 38 S.Ct. 186, 62 L.Ed. 451 (1918). It is cited and partially quoted in two footnotes. Hanover Shoe, Inc. v. United Shoe Machinery Corp., *supra,* 392 U.S. at 488, n. 6, and 490, n. 8, 88 S.Ct. 2224. In *Darnell-Taenzer* Justice Holmes speaking for the Court said 245 U.S. at pp. 533-534, 38 S.Ct. at p. 186.

> The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events.

And again at p. 534, 38 S.Ct. at p. 186:

> If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier. State v. Central Vermont Ry. Co., 81 Vt. 459, 71 A. 193. See Nicola, Stone & Myers Co. v. Louisville & Nashville R.R. Co., 14 I.C.C. 199, 207-209. Baker Manufacturing Co. v. Chicago & North Western Ry. Co., 21 I.C.C. 605. The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. New York, New Haven & Hartford R.R. Co. v. Ballou & Wright, [8 Cir.,] 242 F. 862. Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. 13 I.C.C. 680. Probably in the end the public pays the damages in most cases of compensated torts.

Clearly the stated rule of *Darnell-Taenzer* is that an immediate purchaser may recover and that a remote purchaser may not even though the former suffers no money loss and the latter does, and it is this rule which I believe the Supreme Court to have adopted and applied to antitrust actions in *Hanover*.

I next inquire whether for some reason the rule which I believe the Supreme Court to have adopted should not, in light of its opinion, apply here. On a balancing of the whole opinion in *Hanover* I find none.

If a defendant is required to pay damages to one who has suffered no money loss because of some policy of the law which forbids the court to inquire into after events, then as a matter of basic fairness that defendant should be permitted to assert that same policy when the remote purchaser sues him. In this case the plaintiffs Pioneer Construction Company, Inc. (Civil No. 49808), Cascade Construction Company, Inc. (Civil No. 49638), Page Paving Company (Civil No. 50307), and Copp Paving Company, Inc. (Civil No. C-71-608) seek damages by reason of purchases of liquid asphalt. If the law, as it does, requires that they be paid triple the amount of any overcharges and also requires that defendants pay triple damages on account of the identical liquid asphalt sold by these contractors to plaintiffs, then, of course, there is a six-fold recovery (or more, depending on the length of the chain between the initial purchaser and the consumer) for some of the overcharges. It may be that the Supreme Court intended this to be the result of *Hanover*, but I cannot infer it in the face of the several statements in the opinion that the remote purchaser may not recover.

In *Hanover* the Court did express policy considerations relating to the enforcement of the antitrust laws, and those policy considerations run the other way in this case. It may be that the policy announced in *Hanover* will generally achieve the result desired even though in a particular case the contrary is indicated. The Court did not, however, announce a rule to the effect that the persons most likely to be successful plaintiffs in antitrust litigation are the ones who can recover damage, and I cannot imply that rule from the result reached by the Court nor from the language used by it.

In *Hanover* the Court treated at some length the problems of proof created by a consideration of the remote purchaser. I am inclined to believe that these problems are discussed in justification of the damage rule announced in *Darnell-Taenzer* and followed in *Hanover*. The kind of proof problems suggested in *Hanover* are present here.[1]

Other courts considering the "pass-on" problem post-*Hanover* have reached on one basis or another the conclusion which I reach. They are: Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D.Pa.1970), aff'd sub nom. Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971)—plumbing fixtures; Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 323 F.Supp. 381 (E.D.Pa.1971)—plumbing fixtures; United Egg Producers v. Bauer International Corp., 312 F.Supp. 319 (S.D.N.Y.1970)—eggs; In re Antibiotic Antitrust Actions, 333 F.Supp. 310 (S.D.N.Y.1971)— broad spectrum antibiotic drugs; City and County of Denver v. American Oil Co., 53 F.R.D. 620 (D.Colo.1971)—asphalt; and Balmac, Inc. v. American Metal Products Corp., Civil No. C–71–950 SAW (N.D. Cal., filed Nov. 8, 1972)—gas vent pipe and fittings; City of

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1. Plaintiffs take a simplistic view of the damage problem, urging that: ". . . In order to measure damages incurred by plaintiffs when they purchased asphalt as a part of a road construction contract, it is only necessary to measure the difference between the average price level at the time of the award and the competitive base price line. The measurement of damages in the case of 'indirect' purchases is neither more difficult nor is it different than the measurement of damages in the case of 'direct' purchases." Plaintiffs' Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment, pp. 86-87 (footnote omitted). In any present view of the law the kind of proof which plaintiffs suggest would at most make a prima facie case of damage. Certainly the court could not prevent the defendants from proving that in a particular case for one reason or another (perhaps mistake if nothing else) the low bidder did not consider his asphalt cost in preparing his bid. This means, of course, an examination of each contract. Whatever else, the effect of *Hanover* and *Darnell-Taenzer* is to reject the generalism that because the first in the purchasing chain suffers an overcharge someone late in the chain suffers compensable damage.

Akron, Ohio, v. Laub Baking Co., 5 Trade Reg.Rep. (1972 Trade Cas.), para. 73,930 (N.D.Ohio, April 18, 1972)—bread.

To the contrary is Southern General Builders, Inc. v. Maule Industries, Inc., Civil No. 67–486–Civ. JE (S.D.Fla., filed Feb. 24, 1972)—concrete. *See* the analysis in State of West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710 (S.D.N.Y.1970), aff'd 440 F.2d 1079 (2d Cir. 1971), cert. denied Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971)—broad spectrum antibiotic drugs. *See also* Obron v. Union Camp Corp., 5 Trade Reg.Rep. (1972 Trade Cas.), para. 73,909 (E.D.Mich., March 28, 1972).

The defendants' motion for summary judgment is granted and plaintiffs are denied all relief based upon indirect purchases of liquid asphalt, except in those cases where the indirect purchases of liquid asphalt were made upon pre-existing cost-plus contracts, that is, contracts wherein the plaintiffs agreed to pay the contractors' costs, whatever they may be, plus a fixed percentage.

In my opinion this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the termination of this litigation. Proceedings shall not be stayed unless by order of the court of appeals.

Appendix C

UNITED STATES DISTRICT COURT
District of New Mexico
Albuquerque, New Mexico

H. VEARLE PAYNE
Chief Judge

December 29, 1971

TO ALL COUNSEL OF RECORD.

Re: State of New Mexico v.
American Petrofina, et al
No. 8909 Civil

Gentlemen:

The Court has decided that the motion of the defendants to eliminate road purchase transactions should be granted. The Court does not feel that it should entertain evidence of situations where the plaintiffs did not purchase liquid asphalt directly from a defendant but might have entered into a contract with road constructors for the construction of roads in which liquid asphalt was involved. In other words, the Court does not feel that it should receive evidence of asphalt transactions unless the plaintiff bought the asphalt directly, or unless the asphalt was received on a cost plus basis, as mentioned in the various decisions. I have read the opinion by Chief Judge John W. Lord, Jr., in *Philadelphia Housing Authority, et al., v. American Radiator,* etc., appearing in 50 FRD 13, et seq. I have also read the opinion by Judge Winner in the Denver case, as well as the Hanover shoe case. It appears to me that it has been decided, and correctly so, that the pass-on defense is not proper and conversely that a case such as this should be limited as hereinabove mentioned. Of course, the case will continue as to purchases made directly by the plaintiff and any cost plus purchases. I did not see that any cost

plus purchases were involved, and I only mention this to be careful.

With regard to the defense of the statute of limitations, it appears to me that this is a question of fact. Accordingly, I cannot state at this point that the four-year statute should apply. However, I can state that the plaintiff's complaint will have to be amended to set forth the facts on which the plaintiff relies more specifically than they are set forth. Otherwise, the four-year statute would apply.

I presume that the Court will have to instruct the jury substantially to the effect that the plaintiff lacked knowledge of its cause of action and that the defendant had committed some affirmative act of concealment and that diligence on plaintiff's part would not have revealed the same.

With regard to the statute of limitations, I found the brief in behalf of the defendants, but I was unable to find a brief in behalf of the plaintiff. Plaintiff's briefs were to be filed by December 24th. I cannot remember whether I extended that time verbally or not.

Sincerely,

/s/ H. VEARLE PAYNE
H. Vearle Payne

cc: Clerk, U.S. District Court